

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant: Steven Sholem.

Examiner: Bleck, Carolyn M

Serial No.: 09/653,384

Art Unit: 3626

Filed: September 1, 2000

Docket No.: SHOL-0587

Title: METHOD AND APPARATUS FOR TRACKING THE RELATIVE VALUE OF  
MEDICAL SERVICES

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**BRIEF OF APPELLANT**

This Appeal Brief, pursuant to the Notice of Appeal filed December 14, 2007, is an appeal from the rejection of the Examiner in the Office Action dated September 18, 2007.

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## **REAL PARTY IN INTEREST**

Inventor Steven Sholem is the real party in interest.

## **RELATED APPEALS AND INTERFERENCES**

None.

## **STATUS OF CLAIMS**

Claims 1-41, 52, and 62 have been canceled. Claims 42-51, 53-61, 63, and 64 are rejected. This Brief is in support of an appeal from the rejection of claims 42-51, 53-61, 63, and 64.

## **STATUS OF AMENDMENTS**

There have been no responses filed subsequent to the final rejection mailed September 18, 2007. Appellant respectfully asserts that all claim amendments have been entered.

## SUMMARY OF CLAIMED SUBJECT MATTER

### A. CLAIM 54 –DEPENDENT

The present invention provides a medical management system according to claim 63, wherein the software is configured to generate a recommended duration for a primary medical personnel to visit with the patient, the recommended duration being based at least in part upon the historical payment patterns of the TPP to the one or more medical service providers (page 20, line 27-page 21, line 10).

### B. CLAIM 63- INDEPENDENT

The present invention provides a medical management system comprising at least one electronic device having:

- a) a display (page 31, line 7, Fig. 4);
- b) a memory (page 19, lines 7-8, Fig. 4); and
- c) a processor operating in accordance with software (page 19, lines 7-8, Fig. 4) for:
  - 1) receiving an identifier associated with a third party payor (“TPP”) as input (page 18, lines 13-16);
  - 2) accessing data indicative of the historical payment patterns of the TPP to one or more medical service providers from which a net present value of a future payment by the TPP for at least one requested medical service for a patient associated with the TPP may be generated and assigning a rank to a patient’s TPP (page 18, lines 22-25);
  - 3) generating an indication of the net present value of the at least one requested medical service prior to providing the medical service, the indication based at least in part upon the historical payment patterns of the TPP to the one or more medical service providers (page 15, line 1-page 16, line 7) ; and

- 4) generating an indication of when the patient is accepted as a new patient based in part on the net present value and the rank assigned to the patient's TPP (page 18, lines 10-page 19, line 9);
- 5) generating an indication of when the patient's requested appointment should be scheduled based in part on the net present value and the rank assigned to the patient's TPP (page 20, lines 1-26).

#### C. CLAIM 64 –INDEPENDENT

The present invention provides a medical management system comprising at least one electronic device having:

- a) a display (page 31, line 7, Fig. 4);
- b) a memory (page 19, lines 7-8, Fig. 4); and
- c) a processor operating in accordance with software (page 19, lines 7-8, Fig. 4) for:
  - 1) receiving an identifier associated with a third party payor ("TPP") as input (page 18, lines 13-16);
  - 2) accessing data indicative of the historical payment patterns of the TPP to one or more medical service providers from which a net present value of a future payment by the TPP for at least one requested medical service for a patient associated with the TPP may be generated and assigning a rank to a patient's TPP (page 18, lines 22-25);
  - 3) generating an indication of the net present value of the at least one requested medical service prior to providing the medical service, the indication based at least in part upon the historical payment patterns of the TPP to the one or more medical service providers (page 15, line 1-page 16, line 7) ; and



- 4) generating an indication of when the patient is accepted as a new patient based in part on the net present value and the rank assigned to the patient's TPP (page 18, lines 10-page 19, line 9);
- 5) generating an indication of when the patient's requested appointment should be scheduled based in part on the net present value and the rank assigned to the patient's TPP (page 20, lines 1-26), wherein the software is configured to generate recommended duration for a primary medical personnel to visit with the patient, the recommended duration being based in part upon the historical payment patterns of the TPP to the one or more requested medical services and the rank assigned to the patient's TPP (page 20, line 27-page 21, line 10).

### **GROUND OF REJECTION TO BE REVIEWED ON APPEAL**

1. Claims 42-51, 53-57, 60, 63, and 64 were rejected as being unpatentable under 35 U.S.C. 103 over U.S. Patent No. 5,550,734 to Tarter et al. in view of U.S. Patent Application Publication No. 2002/0055858 to Jackson and further in view of U.S. Patent No. 5,732,401 to Conway.
2. Claims 58 and 59 were rejected as unpatentable under 35 U.S.C. 103 over U.S. Patent No. 5,550,734 to Tarter et al. in view of U.S. Patent Application Publication No. 2002/0055858 to Jackson and further in view of U.S. Patent No. 5,732,401 to Conway and further in view of U.S. Patent Application Publication No. 2002/0035484 to McCormick.
3. Claim 61 was rejected as being unpatentable under 35 U.S.C. 103 over U.S. Patent No. 5,550,734 to Tarter et al. in view of U.S. Patent Application Publication No. 2002/0055858 to Jackson and further in view of U.S. Patent No. 5,732,401 to Conway and further in view of U.S. Patent No. 5,737,539 to Edelson et al.

## **ARGUMENT**

### **GROUND OF REJECTION 1**

Appellant traverses the rejection of claims 42-51, 53-57, 60, 63, and 64 as improper because the rejection fails to teach each and every element of the claims and thus fails to form a prima facie case of obviousness. Two independent claims, claim 63 and claim 64, are before the Board. Independent claim 63 recites a medical management system comprising at least one electronic device having:

- a) a display;
- b) a memory; and
- c) a processor operating in accordance with software for:
  - 1) receiving an identifier associated with a third party payor (“TPP”) as input;
  - 2) accessing data indicative of the historical payment patterns of the TPP to one or more medical service providers from which a net present value of a future payment by the TPP for at least one requested medical service for a patient associated with the TPP may be generated and assigning a rank to a patient’s TPP;
  - 3) generating an indication of the net present value of the at least one requested medical service prior to providing the medical service, the indication based at least in part upon the historical payment patterns of the TPP to the one or more medical service providers; and
  - 4) generating an indication of when the patient is accepted as a new patient based in part on the net present value and the rank assigned to the patient’s TPP
  - 5) generating an indication of when the patient’s requested appointment should be scheduled based in part on the net present value and the rank assigned to the patient’s TPP

Independent claim 64 recites a medical management system comprising at least one electronic device having:

- a) a display;
- b) a memory; and
- c) a processor operating in accordance with software for:
  - 1) receiving an identifier associated with a third party payor (“TPP”) as input;
  - 2) accessing data indicative of the historical payment patterns of the TPP to one or more medical service providers from which a net present value of a future payment by the TPP for at least one requested medical service for a patient associated with the TPP may be generated and assigning a rank to a patient’s TPP;
  - 3) generating an indication of the net present value of the at least one requested medical service prior to providing the medical service, the indication based at least in part upon the historical payment patterns of the TPP to the one or more medical service providers; and
  - 4) generating an indication of when the patient is accepted as a new patient based in part on the net present value and the rank assigned to the patient’s TPP;
  - 5) generating an indication of when the patient’s requested appointment should be scheduled based in part on the net present value and the rank assigned to the patient’s TPP, wherein the software is configured to generate recommended duration for a primary medical personnel to visit with the patient, the recommended duration being based in part upon the historical payment patterns of the TPP to the one or more requested medical services and the rank assigned to the patient’s TPP.

It would not have been obvious to one of ordinary skill in the art to combine the Tarter, Jackson and Conway references to arrive at Appellant's claimed invention. The characterization by the Examiner of Tarter, Jackson and Conway is over simplified and not entirely accurate.

Tarter discloses a computerized method and system for financing health care providers, especially pharmacies based on accounts receivable (Abstract). Jackson discloses a method of financing payments to providers of medical services. The Examiner relies on paragraphs [0007] and [0012] of Jackson for the teaching that the health care industry uses a currency referred to as medical relative value units (RVUs ) and all medical procedures have a medical RVU assigned to them.

Conway discloses a system for tracking costs of medical procedures by monitoring movement of personnel and/or equipment and supplies. The Examiner relies on column 12, lines 50-54 and column 14, lines 31-48 of Conway to show "generating an indication of when the patient's requested appointment should be scheduled based in part on the cost of the procedure" (*See* page 4 of the Final Office Action mailed September 18, 2007). However, to be more precise, Conway teaches a schedule database which includes a sequence of records each of which schedules a patient care activity or procedure to be undertaken at a room in the healthcare facility and using the information to report on which procedures have been performed efficiently or inefficiently.

For the purpose of applying prior art, the Examiner must read independent claims 63 and 64 to require generating an indication of when to schedule an appointment. Further, for the purposes of applying prior art, the Examiner must read independent claim 64 to require

generating an indication of appointment duration. Tarter, Jackson and Conway all fail to supply these teachings.

There is no disclosure anywhere in Tarter to “generating an indication of when a patient is accepted as a new patient based in part on the net present value” and “the rank assigned to the patient’s TPP,” as recited in independent claims 63 and 64. Further, there is no disclosure of “generating an indication of when the patient’s requested appointment should be scheduled, based in part on the net present value” and “the rank assigned to the patient’s TPP,” as recited in independent claims 63 and 64. Still further, there is no disclosure in Tarter to “wherein the software is configured to generate a recommended duration for a primary medical personnel to visit with the patient, the recommended duration being based at least in part upon the historical payment patterns of the TPP to the one or more medical service providers,” as recited in independent claim 64.

The claims as written also recite assigning a rank. The rank is a factor in whether to accept the patient as a new patient. The same rank is a factor in scheduling and duration. All of the patients are in the database, accepted as a new patient or not and all of the patients are considered for scheduling and duration. If the rank is such to not accept the patient as a new patient then the rank would also be such to not schedule the patient’s appointment for any duration. Tarter, Jackson and Conway all fail to supply these teachings.

There is no disclosure in either Jackson or Conway as to net present value, let alone using net present value as a factor for accepting patients and/or scheduling appointments, as recited in independent claims 63 and 64. Conway is directed only to tracking the cost and efficiency of a procedure in a room.

The Examiner does admit in the Final Office Action mailed September 18, 2007, at the bottom of page 3 to the top of page 4 that “Tarter does not disclose that a net present value of a future payment by the TPP for at least one requested medical service for a patient associated with the TPP may be generated, generating an indication of the net present value of the at least one requested medical service prior to providing the medical service, and generating an indication of when the patients requested appointment should be scheduled based in part on the net present value and the rank assigned to the patient’s TPP.” Tarter clearly does not disclose many of the positive recitations found in independent claims 63 and 64.

According to the Examiner on page 4 of the Final Office Action mailed September 18, 2007, the motivation for combining Tarter, Jackson and Conway “would have been to provide predictability with regard to the payment of medical services”; “enhance quality and profitability”; and “generating a more meaningful analysis based on the time value of money.” However, there is absolutely no disclosure in Tarter, Jackson or Conway to generating an indication of when the patient is accepted as a new patient based in part on the net present value and the rank assigned to the patient’s TPP and/or generating an indication of when the patient’s requested appointment should be scheduled based in part on the net present value and the rank assigned to the patient’s TPP.

To reach the recitations of the claims and conjure up a combination of component elements allegedly deemed obvious, the Examiner resorts to hindsight reasoning. “Any judgment on obviousness is in a sense necessarily a reconstruction based on hindsight reasoning, **but** so long as it takes into account only knowledge which was within the level of ordinary skill in the art at the time the claimed invention was made *and does not include knowledge gleaned*

*only from applicant's disclosure*, such a reconstruction is proper.” *In re McLaughlin* 443 F.2d 1392, 1395, 170 USPQ 209, 212 (CCPA 1971) (emphasis added). However, the Examiner improperly imported teachings from Appellant’s disclosed invention to reconstruct the claim elements from the cited references.

The proposed combination of Tarter, Jackson and Conway is implausible without Appellant’s claims as a guide – a hindsight induced stretch to say the least. The scope and content of the prior art alone or in combination, does not meet all of Appellant’s claim limitations. Accordingly, Appellant respectably asserts that such a string of inferences pieced together to accomplish the limitations of the claims is not obvious nor motivated by the cited art, but rather stems from impermissible hindsight reasoning in light of Appellant’s claimed invention. “It is impermissible to use the claimed invention as an instruction manual or “template” to piece together the teaching of the prior art so that the claimed invention is rendered obvious ... one cannot use hindsight reconstruction to pick and choose among isolated disclosures [such as unnamed accessories] in the prior art to deprecate the claimed invention.” *In re Fritch*, 972 F. 2d 1260, 23 USPQ2d 1780, 1784 (Fed. Cir. 1984). Jackson and Conway fail to even disclose the claim recitations found in Appellant’s independent claims 63 and 64 that the Examiner appears to be relying on these secondary references to teach.

Dependent claim 54 and independent claim 64 are non-obvious and allowable for reasons similar to those discussed in relation to claim 63 above. Both dependent claim 54 and independent claim 64 recite a medical management system according to claim 63, wherein the software is configured to generate a recommended duration for a primary medical personnel to visit with the patient, the recommended duration being based at least in part upon the historical



payment patterns of the TPP to the one or more medical service providers.

Tarter fails to disclose “wherein the software is configured to generate recommended duration for a primary medical personnel to visit with the patient, the recommended duration being based in part upon the historical payment patterns of the TPP to the one or more requested medical services”, as recited in both dependent claim 54 and independent claim 64. Tarter further fails to disclose “wherein the software is configured to generate recommended duration for a primary medical personnel to visit with the patient, the recommended duration being based in part upon the historical payment patterns of the TPP to the one or more requested medical services and the rank assigned to the patient’s TPP”, as recited in independent claim 64. Again, as with Tarter, there is no disclosure in Jackson or Conway to “wherein the software is configured to generate a recommended duration for a primary medical personnel to visit with the patient, the recommended duration being based at least in part upon the historical payment patterns of the TPP to the one or more medical service providers,” as recited in dependent claim 54 and independent claim 64. In Conway, the time at which the activity is to be undertaken and the time at which the activity is completed has nothing to do with the historical payment patterns of the TPP.

More motivational statements by the Examiner, with regard to dependent claim 54 and ultimately independent claim 64, are found on page 8 of the Final Office Action mailed September 18, 2007. The motivation for combining Tarter, Jackson and Conway with respect to claim 54 “would have been to determine the costs associated with a visitation.” However, there is just no disclosure anywhere in Tarter, Jackson or Conway to the duration of a visit being based on the historical payment patterns of the TPP.

The combination of Tarter, Jackson and Conway is impermissible. An Examiner “cannot pick and choose among individual parts of assorted prior art references ‘as a mosaic to recreate a facsimile of the claimed invention.’” *Akzo N. V. v. United States Int’l Trade Comm’n*, 808 F.2d 1471, 1 USPQ2d 1241, 1246 (Fed. Cir. 1986), *cert denied*, 482 U.S. 909 (1987). Appellant is not even sure what elements are being relied on in the assorted prior art references as none appear to teach the claimed invention.

Tarter, Jackson and Conway are related merely as business methods in the medical field and no more. The Tarter reference, which discloses an accounts receivable management system, cannot be properly combined with Jackson and/or Conway. Conway discloses a system for tracking costs of medical procedures by monitoring the movements of personnel, supplies and equipment, and not via accounts receivable. Nor is Jackson directed to accounts receivable. Even if Tarter is modified or combined as proposed by the Examiner, the resultant modification or combination would fall short of yielding the claimed invention for failure to satisfy the claimed limitations. The suggested combination of references is clearly improper under 35 U.S.C. ‘103 because it would require a change in the basic principles under which the Tarter computerized method and system was defined.

If an independent claim, such as claim 63, is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is also nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Appellant respectfully asserts, based on the arguments provided *supra*, that claims 42-51, 53-57, and 60 are non-obvious. Accordingly, Appellant respectfully contends that claims 42-51, 53-57, and 60 are allowable.

Again, it is difficult, if not impossible, to imagine how one skilled in the art in possession

of all these references could conceive of the present invention absent hindsight reconstruction which was prohibited by the Supreme Court in *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 220 U.S. 428 435-436 (1911). To find obviousness, “there must be some reason for the combination other than the hindsight gleaned from the invention itself.” *Interconnect Planning Corp. v. Feil*, 227 U.S.P.Q. 543, 551 (Fed. Cir. 1985). Stated in another way, “[I]t is impermissible to use the claimed invention as an instruction manual or ‘template’ to piece together the teachings of the prior art so that the claimed invention is rendered obvious.” *In re Fritch* 23 U.S.P.Q.2d 1780, 1784 (Fed. Cir. 1992).

Moreover, the prior art does not include each element claimed in a single reference or even in the combination of references. All of the claimed elements are not found in Tarter, Jackson and/or Conway. Additionally, “[a] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon ex post reasoning.” *KSR InternationalCo.*, (p. 15, slip opinion). The Examiner provided no concrete evidence in the record to support the conclusion of obviousness. The Examiner turns merely to inappropriate hindsight reasoning. Hence, Appellant respectfully asserts that claims 42-51, 53-57, 60, 63, and 64 are in condition for allowance.

## **GROUND OF REJECTION 2**

If an independent claim, such as claim 63, is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is also nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Appellant respectfully asserts, based on the arguments provided *supra*, that claims

58 and 59 are non-obvious. Accordingly, Appellant respectfully contends that claims 58 and 59 are allowable.

### **GROUND OF REJECTION 3**

If an independent claim, such as claim 63, is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is also nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Appellant respectfully asserts, based on the arguments provided *supra*, that claim 61 is non-obvious. Accordingly, Appellant respectfully contends that claim 61 is allowable.

### **SUMMARY**

In summary, Appellant respectfully requests reversal of the September 18, 2007 Office Action rejection of claims 42-51, 53-61, 63, and 64.

Respectfully submitted,

Date: January 9, 2008

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**APPENDIX A - CLAIMS ON APPEAL**

42. The medical management system of claim 63, wherein a payment pattern of the TPP comprises a time delay in payment of fees by the TPP, an allowable fee schedule of the TPP, and a percentage of the allowable fees paid by the TPP.

43. The medical management system of claim 63, wherein a relative value for the at least one medical service is a difference between the net present value for the at least one medical service provided and a cost of providing the at least one medical service.

44. The medical management system of claim 43, wherein the cost of providing the at least one medical service is a function of at least one of an administrative cost of a medical services provider, an overhead cost of a medical office, a cost for medical office staff salaries, an equipment and supplies cost, and a utilities cost.

45. The medical management system of claim 63, wherein the indication of the net present value is one of a plurality of ranked indicators.
46. The medical management system of claim 45, wherein the plurality of ranked indicators includes at least red, orange and green.
47. The medical management system of claim 63, wherein the identifier is an identifier of a patient associated with the TPP and the software is configured to generate an indication of whether it would be profitable to accept the patient as a new patient based at least in part upon the historical payment patterns of the TPP to one or more medical service providers.
48. The medical management system of claim 47, wherein the indication is generated as a function of the net present value of anticipated medical services to be provided for the patient.
49. The medical management system of claim 63, wherein the indication is generated as a function of the expected profitability of the TPP.
50. The medical management system of claim 63, wherein the software is configured to generate an indication of whether it would be profitable to enter into a services agreement with the TPP.
51. The medical management system of claim 50, wherein the indication is generated as a function of at least one payment pattern of the TPP.

53. The medical management system of claim 63, wherein the indication is generated as a function of at least one payment pattern of the TPP with which the patient is associated.

54. The medical management system of claim 63, wherein the software is configured to generate a recommended duration for a primary medical personnel to visit with the patient, the recommended duration being based at least in part upon the historical payment patterns of the TPP to the one or more medical service providers.

55. The medical management system of claim 54, wherein the software is further configured to generate a timer indicating time remaining in the recommended duration.

56. The medical management system of claim 63, further comprising a central controller in communication with the at least one electronic device, the central controller enabling communication between a plurality of electronic devices and databases.

57. The medical management system of claim 56, wherein each of the at least one electronic device is configured as one of a local access terminal, a remote access terminal, a wireless access terminal, and a wireless interface.

58. The medical management system of claim 63, wherein the at least one electronic device is configured as one of a wireless access terminal and a wireless interface, and the at least one electronic device further comprises software configured to receive an electronic superbill and automatically send related charges to a TPP for payment.

59. The medical management system of claim 63, wherein the at least one electronic device is configured as one of a wireless access terminal and a wireless interface, and the at least one electronic device further comprises software configured to transmit to a pharmacy a prescription, billing information and an address to which the prescription should be delivered.

60. The medical management system of claim 63, the at least one electronic device further comprising software configured to evaluate a use pattern of at least one supply of a medical services provider, evaluate an inventory quantity of the at least one supply, evaluate an estimated scheduled appointment use of the at least one supply, and automatically order an appropriate quantity of the at least one supply.

61. The medical management system of claim 63, the at least one electronic device further comprising a biometric identifying device operatively coupled thereto.

63. A medical management system comprising at least one electronic device having:

- a) a display;
- b) a memory; and
- c) a processor operating in accordance with software for:
  - 1) receiving an identifier associated with a third party payor ("TPP") as input;
  - 2) accessing data indicative of the historical payment patterns of the TPP to one or more medical service providers from which a net present value of a future payment



by the TPP for at least one requested medical service for a patient associated with the TPP may be generated and assigning a rank to a patient's TPP;

- 3) generating an indication of the net present value of the at least one requested medical service prior to providing the medical service, the indication based at least in part upon the historical payment patterns of the TPP to the one or more medical service providers; and
- 4) generating an indication of when the patient is accepted as a new patient based in part on the net present value and the rank assigned to the patient's TPP;
- 5) generating an indication of when the patient's requested appointment should be scheduled based in part on the net present value and the rank assigned to the patient's TPP.

64. A medical management system comprising at least one electronic device having:

- a) a display;
- b) a memory; and
- c) a processor operating in accordance with software for:
  - 1) receiving an identifier associated with a third party payor ("TPP") as input;
  - 2) accessing data indicative of the historical payment patterns of the TPP to one or more medical service providers from which a net present value of a future payment

by the TPP for at least one requested medical service for a patient associated with the TPP may be generated and assigning a rank to a patient's TPP;

- 3) generating an indication of the net present value of the at least one requested medical service prior to providing the medical service, the indication based at least in part upon the historical payment patterns of the TPP to the one or more medical service providers; and
- 4) generating an indication of when the patient is accepted as a new patient based in part on the net present value and the rank assigned to the patient's TPP;
- 5) generating an indication of when the patient's requested appointment should be scheduled based in part on the net present value and the rank assigned to the patient's TPP, wherein the software is configured to generate recommended duration for a primary medical personnel to visit with the patient, the recommended duration being based in part upon the historical payment patterns of the TPP to the one or more requested medical services and the rank assigned to the patient's TPP.

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**APPENDIX B - EVIDENCE**

There is no evidence entered by the Examiner and relied upon by Appellant in this appeal.

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**APPENDIX C - RELATED PROCEEDINGS**

There are no proceedings identified in the "Related Appeals and Interferences" section.